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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/725,005  
Filing Date: December 02, 2003  
Appellant(s): SEGAL ET AL.

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Mark M. Friedman  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 11/17/2009 appealing from the Office action mailed 06/11/2009.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

UK 2,119,633	Mackay	11-1983
US 2006/0160050	Matson	07-2006
US 5,582,028	Riling et al	12-1996

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 1-9 and 18-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gordon (US 2003/0219513) in view of Mackay (UK 2,119,633), Matson (US 2006/0160050) and Riling et al (US 5,582,028).**

In regard to claims 1 and 18, Gordon discloses a system for reducing human body weight comprising a portable kit that includes a plurality of foods with a predetermined total carbohydrate content, said foods spatially organized in levels, wherein each level includes foods of substantially similar carbohydrate content, where the system provides permanent weight loss by limiting a daily carbohydrate intake to said predefined carbohydrate content. Specifically in regard to claims 1 and 18, Gordon discloses a method and a system for monitoring or controlling a nutritional intake of a subject comprising providing a plurality of different types of foods packaged to contain a predetermined and substantially uniform content of at least one nutritional component (such as carbohydrate content); and controlling the number of food packages consumed during a day (Abstract, [0031], [0048], [0066], [0072], [0074], [0087]). Gordon discloses an assembly of food units for use in effecting the method and the system (Abstract). Gordon further discloses spatial organization of foods in levels (Fig. 5a and 5b). Gordon further discloses an assembly of food units comprising a plurality of food units, each food unit comprising: (a) a package; and (b) a different type of food packaged in the package and having a predetermined content of at least one nutritional component such as carbohydrate ([0031], [0066], [0072], [0074], [0087]) which is substantially uniform for all of the food units of the assembly ([0026]). Gordon further discloses that the diet-responsive condition is selected from the group consisting of obesity, overweight, diabetes, hypercholesterolemia and hyperglycemia ([0037]). Gordon further discloses that each of the packages is marked in a specific manner that identifies it with an assembly which comprises similarly marked packages ([0040]). Gordon further

discloses that each package 13 is identified with respect to the type of food it contains, preferably both in writing and optionally via an image ([0071]). In regard to the spoiling prevention means recitation, Gordon discloses that foods may be packaged after freezing for purposes of preservation ([0071]). Preferably, such foods have a sufficiently long storage or shelf-life that they may be packaged well in advance of consumption ([0071]). Therefore, Gordon discloses a system that is capable of reducing human body weight, comprising an assemblage of plurality of foods consumed during one day placed in a carton which can be called a "portable kit", wherein said plurality of foods have at least one predetermined nutritional component which can be carbohydrate content, with said foods organized/oriented in stacked levels, wherein each level includes food packages of substantially similar carbohydrate content. Gordon teaches foods organized in stacked groups/levels, where each level has similar carbohydrate content. Gordon discloses horizontal arrangement of foods, where foods are packaged in the container stacked into four levels, where each level has similar carbohydrate content (Figure 5a). Therefore, Gordon discloses food levels organized in spatial arrangement, where each level organized in a manner, such that foods have similar carbohydrate content within each level.

Claim 1 further recites that carbohydrate content varies from level to level. Gordon does not disclose that feature. Mackay discloses a compartmented plate (10) is divided into different regions (16, 18, 24, 26) which are marked in a different manner, e.g. by color coding, to indicate the dietary characteristics of different types of food intended to be placed in each region (Abstract, Fig. 2). Mackay discloses that the plate

may thus be used to assist in a diet intended, say, to reduce consumption of carbohydrates, with the different regions intended for foodstuffs having different carbohydrate content (Abstract). Mackay further discloses that a range of different sizes and shapes of dishes may be provided (page 1 lines 41-46). Mackay further discloses that two smaller compartments 16 and 18 are each intended for foods having a relatively high carbohydrate content and are conveniently colored in red (page 2 lines 86-89). Mackay further discloses that a relatively larger region 24 intended for foods having very low carbohydrate content colored in green, and relatively smaller region 26 is intended for foods having moderate carbohydrate content colored in amber or orange (page 1 lines 13-19, 89, 107-115; page 2 claim 3). Thus, Mackay discloses restricting carbohydrate intake by providing compartmented plate containing foods with defined carbohydrate content; providing plurality of foods with a known carbohydrate content and organizing foods in a portable device according to optimal carbohydrate intake, and freely consuming foods having variable carbohydrate content. Mackay discloses the feature of variable carbohydrate content from one compartment to another, which are marked in a different manner, e.g. by color coding, to indicate different levels of carbohydrate content (i.e. green for low, amber or orange for moderate and red for high).

Matson discloses a system and method that utilizes a set of fixed volume containers that are graduated to provide a user means to control the volume of food consumed over time (Abstract). In accordance with the instant invention, the contents of the containers are consumed over time according to a schedule which identifies the

appropriate containers and the frequency of the meals to be consumed each day (Abstract). Therefore, Matson discloses organizing foods in a vertical arrangement with different values of controlled variable (in this case of volume).

Since Gordon discloses a system for reducing human body weight comprising a portable kit that includes a plurality of foods with a predetermined total carbohydrate content, said foods spatially organized in levels, wherein each level includes foods of substantially similar carbohydrate content, where the system provides permanent weight loss by limiting a daily carbohydrate intake to said predefined carbohydrate content, and Mackay discloses providing foods in the plate with color coded compartments containing foods with variable carbohydrate content to reduce consumption of carbohydrates, and Matson discloses arranging foods in a vertical asymmetrical arrangement (pyramidal shape) based on different values of the controlled variable (i.e. volume of foods), it would have been obvious to modify Gordon and to employ a plurality of foods having a varying carbohydrate content as taught by Mackay and arrange them in the pyramidal shaped vertical array as taught by Matson, so that they are grouped by the carbohydrate content for the purpose of diet control in view of the art taken as a whole. The references are seen to fairly teach one of ordinary skill in the art to package on the basis of any nutrient desired, including carbohydrates, and arrange them in any sequence desired.

Claim 1 also recites the spoiling prevention means (see also claims 5, 6, 21 and 22). As recited, these spoiling prevention means is a cooling pack. Gordon discloses that any type of conventional storage expedient can be used with his food packs



([0071]). As evidenced by Riling et al, it is conventional in the art to employ a cooling pack to prevent spoilage. To modify Gordon and employ a cooling pack to prevent spoilage would have been an obvious result effective variable and an obvious function of the type of food and the preserving time desired. Therefore, it would have been obvious to modify the teachings of Gordon and use cooling packs in a portable kit/device/ apparatus, if necessary, in order to preserve the freshness of foods. The particular arrangement and color coding of the cooling packs would have been a matter of personal choice.

In regard to claims 2 and 19 , Gordon discloses that the foods are contained in separate containers (food packaged in a package) ([0028], [0106]).

In regard to the shape/configuration limitation in claims 3, 4 and 23, it is noted that the configuration (shape) of the claimed kit is a matter of choice which the person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed kit is significant (See MPEP 2144.04 (IV)). Also, rearranging/shifting foods in the kit would not have modified the operation of the claimed kit. Further in this regard, it is noted that the particular shape of the kit, and arrangement of the foods in the kit, would have been a matter of personal choice, design and preference. It is also noted that there is no restriction on the carbohydrate consumption based on the asymmetrical arrangement of foods. In any case, Matson discloses the pyramidal asymmetrical configuration, and it would have been obvious to modify Gordon in view of Matson for the reasons as stated above.

In regard to the color-coding limitation in claims 7-9, Gordon discloses that each of the packages is marked in a specific manner that identifies it with an assembly which comprises similarly marked packages [0040]. Mackay discloses a compartmented plate (10) is divided into different regions (16, 18, 24, 26) which are marked in a different manner, e.g. by color coding, to indicate the dietary characteristics of different types of food intended to be placed in each region (Abstract, Fig. 2), and therefore to employ color as the means to differentiate content would have been obvious. In regard to claim 9, Mackay discloses red color for the high-carbohydrate content foods, orange or amber color coding for the moderate carbohydrate content foods, and green color coding for the low carbohydrate content foods (page 1 lines 13-19, 89, 107-115; page 2 claim 3).

In regard to claim 20, Gordon discloses separate compartments in a one piece enclosure (Fig. 5b).

#### **(10) Response to Argument**

Applicant's arguments have been fully considered but they are not persuasive.

At page 9 top paragraph of the Appeal Brief, Appellant states that "The Examiner agrees that Gordon does not teach "levels" in the sense of the present invention, i.e. groups of foods of substantially similar carbohydrate content wherein the carbohydrate content of the foods varies from group to group (level to level)". Examiner respectfully disagrees. Gordon discloses a container with foods arranged in four levels, where foods having substantially uniform carbohydrate content within each level. Therefore, Gordon does disclose groups of foods of substantially similar carbohydrate content arranged in

levels. Gordon does not disclose that the carbohydrate content varies from level to level.

At page 9 bottom paragraph and page 10 of the Appeal Brief, Appellant states that:

During the course of the prosecution, the Examiner repeatedly misstated the meaning of "levels". Her position is that Matson's teaching of organizing foods in a vertical arrangement with different values of controlled variable (in this case of volume) is equivalent to the recitation of the "levels" in claims 1 and 18 (page 9 bottom paragraph and page 10 top paragraph of the Appeal Brief).

In order to match, or be the equivalent of, the definition of "level" of the present invention, each of Matson's containers in FIG. 3C should have included only foods of substantially similar carbohydrate content, and this substantially similar carbohydrate content should have varied from container 300 & 301 to container 310 & 311 to container 320 & 321, etc. This most emphatically is not taught anywhere in Matson (page 10 second paragraph of the Appeal Brief).

If Matson does not teach "levels", and levels are not taught in any of the three other references, then the Examiner has failed to state a case of *prima facie* obviousness (page 10 bottom paragraph of the Appeal Brief).

In response to this argument, it is noted that the following definitions of "levels" were found in the instant specification:

stacking of a plurality of separate food container or bags, arranged in groups or "levels" (Specification page 4 bottom paragraph).

In this disclosure, "top" and "bottom" indicate spatial arrangement, and not necessarily a vertical structure. The largest group of containers (in a bottom level near the bottom side) preferably includes foods selected from the group of essentially carbohydrate free foods (Specification page 4 bottom paragraph).

Thus, the specification discloses that foods are organized in groups (i.e. levels) each group/level having similar carbohydrate content. The levels (groups of foods)

indicate spatial arrangement of foods. In this sense, Gordon does teach foods organized in stacked groups/levels, where each level has similar carbohydrate content. Gordon discloses horizontal arrangement of foods, where foods are packaged in the container stacked into four levels, where each level has similar carbohydrate content (Figure 5a). Therefore, Gordon discloses food levels organized in spatial arrangement, where each level is organized in a manner, such that foods have similar carbohydrate content within each level. In regard to the arguments related to the Matson reference, it is noted that Matson is relied upon as a teaching of a kit having asymmetrical pyramid shape food arrangement, providing a kit containing stacked food packages with controlled predetermined volume of foods. The kit provides foods arranged in pyramid shape for a daily consumption in order to reduce the weight of the consumer (Abstract, Fig. 3C). Further in this regard, it is noted that the controlled variable responsible for the weight loss (in this case volume of the container) varies from the top to the bottom of the food arrangement (Fig. 3C). Therefore, Appellant's arguments regarding Matson and teaching of "levels" limitation by Matson are not persuasive. Matson is not relied upon as a teaching of foods organized in stacked groups/levels, where each level has similar carbohydrate content. Matson is relied upon as a teaching of a kit having asymmetrical pyramid shape food arrangement, providing a kit containing stacked food packages with controlled predetermined volume of foods, where the controlled variable, responsible for the weight loss (in this case volume of the container), varies from the top to the bottom of the food arrangement.

At page 10 bottom paragraph and page 11 top paragraph of the Appeal Brief, Appellant states that:

Moreover, the Appellant's argument that Matson teaches away from the present invention is not an argument that shows non-obviousness by attacking references individually, but an argument showing lack of motivation or suggestion to combine the references. The combination of Gordon (foods with the same nutritional content, regardless of spatial arrangement), Mackay (single plate with a two-dimensional spatial arrangement of different nutritional components) and Matson (compartmentalized containers with different values of a controlled volume variable arranged vertically) which supposedly discloses all the limitations of claim 18 and element (a) of claim 1 is not suggested in any of these references. Appellant submits that the combination would also not be obvious to one of ordinary skill in the art, since one of such skill would have absolutely no motivation to combine the four references, particularly since Matson teaches away from such a combination.

Examiner respectfully disagrees. First, Matson does not teach away from such combination of references. As stated above, Gordon discloses a system for reducing human body weight comprising a portable kit that includes a plurality of foods with a predetermined total carbohydrate content, said foods spatially organized in levels, wherein each level includes foods of substantially similar carbohydrate content, where the system provides permanent weight loss by limiting a daily carbohydrate intake to said predefined carbohydrate content. Gordon discloses foods organized in stacked groups/levels, where each level has similar carbohydrate content. Gordon discloses horizontal arrangement of foods, where foods are packaged in the container stacked into four levels, where each level has similar carbohydrate content (Figure 5a). Gordon discloses food levels organized in spatial arrangement, where each level is organized in a manner, such that foods have similar carbohydrate content within each level.

Mackay discloses reduction of carbohydrate consumption by providing compartmented plate with different regions intended for foodstuffs having different carbohydrate content. Thus, Mackay discloses restricting carbohydrate intake by providing a food kit with defined carbohydrate content; providing a plurality of foods with a known carbohydrate content and organizing foods in a portable device according to optimal carbohydrate intake, and freely consuming foods having variable carbohydrate content. Mackay discloses the feature of variable carbohydrate content from one compartment to another, which are marked in a different manner, e.g. by color coding, to indicate different levels of carbohydrate content (i.e. low, moderate and high).

Matson is relied upon as a teaching of a kit having asymmetrical pyramid shape food arrangement, and providing a kit containing stacked food packages with controlled predetermined volume of foods. The kit provides foods arranged in pyramid shape for a daily consumption in order to reduce the weight of the consumer (Abstract, Fig. 3C). Further in this regard, it is noted that the controlled variable responsible for the weight loss (in this case volume of the container) varies from the top to the bottom of the food arrangement (Fig. 3C).

As evidenced by Rilling et al, it is conventional in the art to employ a cooling pack to prevent spoilage.

Gordon, Mackay and Matson disclose reduction of weight by controlling the variables responsible for the weight loss, such as amount of carbohydrates (in Gordon, Mackay) and volume of food consumed (in Matson). It would have been obvious to modify Gordon in view of Mackay and to provide a food arrangement where foods have

variable carbohydrate content and marked accordingly to its carbohydrate level, in order to draw consumer attention to foods containing high, moderate or low carbohydrate content as taught by Mackay. It would have been obvious to modify Gordon in view of Mackay and Matson and to provide asymmetrically shaped pyramidal kit as taught by Matson. It would have been obvious to modify Gordon in view of Mackay and Matson and further in view of Riling et al and to include cooling packs as a spoiling prevention means in a kit intended for the daily consumption, especially if the kit includes perishable foods.

At page 11 second paragraph of the Appeal Brief, Appellant states that:

Thus, the Examiner has shifted her position from the first to the second non-final rejection, implicitly recognizing that the rejections based on Gordon alone (claims 18-20 and 23) or Gordon plus Riling et al (claims I-9 and 21-22) were erroneous. This shift indicates that the Examiner did not understand the meaning of "levels", and that she has mistakenly stated in the first non, final rejection that "levels" were taught by Gordon, a position she retracted in the second non-final rejection. Further, this radical change from a rejection of the same claims based on one or two references to a rejection based on the combination of four references shows in Appellant's opinion how non-obvious it would have been to one of ordinary skill in the art to combine these references absent explicit teaching in the references themselves.

Examiner respectfully disagrees. In response to this argument, as stated above, it is noted that the following definitions of "levels" were found in the instant specification:

stacking of a plurality of separate food container or bags, arranged in groups or "levels" (Specification page 4 bottom paragraph).

In this disclosure, "top" and "bottom" indicate spatial arrangement, and not necessarily a vertical structure. The largest group of containers (in a bottom level near the bottom side) preferably includes foods selected from the group of essentially carbohydrate free foods (Specification page 4 bottom paragraph).

Thus, foods are organized in groups (i.e. levels) each group/level having similar carbohydrate content. The levels (groups of foods) indicate spatial arrangement of foods. In this sense, Gordon does teach foods organized in stacked groups/levels, where each level has similar carbohydrate content. Gordon discloses horizontal arrangement of foods, where foods are packaged in the container stacked into four levels, where each level has similar carbohydrate content (Figure 5a). Therefore, Gordon discloses food levels organized in spatial arrangement, where each level is organized in a manner, such that foods have similar carbohydrate content within each level. In response to the arguments regarding the second Non-Final Office action, it is noted that the Examiner included additional references teaching variable carbohydrate content of foods and food kits having asymmetrical shape to further reinforce the rejection. The Examiner included additional references to further reinforce the rejection by providing a specific teaching of carbohydrate content differentiation (low, high moderate in Mackay) and asymmetrical pyramid shape of the kit intended for the daily consumption of foods that results in a weight loss (Matson). In the first Non-Final rejection it was stated that the particular shape and spatial arrangement of the claimed kit would have been an obvious matter of choice and design, since nowhere in the claims or specification is the consumption of foods in the kit restricted by any sequence of foods consumed, amount of carbohydrates per each meal, or any other restriction. The only restriction that is placed on the carbohydrate consumption is the amount of carbohydrates consumed per day.



At page 11, bottom paragraph of the Appeal Brief, Appellant restates the content of claims 1 and 18.

In response to Appellants arguments regarding claims 2 and 19 (page 12 of the Appeal Brief), claims 5, 6 and 8 (page 14 of the Appeal Brief), claims 20, 21 and 22 (page 15 of the Appeal Brief), these urgings are not convincing for the reasons given above.

At page 12 bottom paragraph and page 13 top paragraph of the Appeal Brief, Appellant states that:

The Examiner has repeatedly stated re. claims 3, 4, 18 and 23 that the shape/configuration of the claimed kit is a matter of choice which the person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the kit is significant. This position is untenable and plain wrong. As repeatedly argued by the Appellant, the configuration of the kit is not a matter of choice but of a definite design: the levels include fewer and fewer foods (containers or compartments) as the food carbohydrate content increases. The different (varied) carbohydrate content of the food in different levels claimed in claims 3, 4, 18 and 23 has a criticality explained by Appellant in detail, see e.g. specification p. 11, lines 7-9 and 12-20.

Appellant further states that rearrangement of the foods in the kit would lead to the increase of daily content of carbohydrates. Examiner respectfully disagrees. Gordon discloses limited predetermined amount of carbohydrates per day and foods assembled for consumption according to this limit. Therefore, the amount of carbohydrate consumed per day can not be exceeded regardless of the arrangement of foods in the kit. Gordon also discloses indicating the amount of carbohydrates per each package. Further in this regard, as stated above, there is no restriction on food carbohydrate consumption found in the claims, except for the restricted total daily

amount, which is taught in Gordon as well. The claims also recite that the food packages are color coded to indicate carbohydrate content depending on the amount of carbohydrates. Therefore, color coding serves as an indication of the amount of carbohydrates consumed. Further in this regard, the foods in the recited kit arrangement could be consumed freely throughout the day, without any restriction on the sequence amount consumed, time consumed, etc. Therefore, the asymmetrical spatial arrangement is seen to have been simply a matter of design, and Matson teaches such design configuration.

In regard to claims 7 and 9 (page 14 of the Appeal Brief), Appellant states that:

since none of the four references used in the final rejection teaches "levels", *mutatis mutandis*, none of the references teaches color-coded levels (claim 7). Specifically, none of the references teaches red for a top level, yellow for a middle level and green for a bottom level (claim 9). The latter particular choice of colors resembles the red/yellow/green traffic light meanings of stop/ready/go and provides an additional indication helpful with the diet regimen, as specified in the description on page 5, lines 23-28.

In response to the "levels" arguments, this urging is not convincing for the reasons given above. In response to the red/yellow/green color coding, it is noted that Mackay discloses a compartmented plate (10) which is divided into different regions (16, 18, 24, 26), which are marked in a different manner, e.g. by color coding, to indicate the dietary characteristics of different types of food intended to be placed in each region (Abstract, Fig. 2), and therefore to employ color as the means to differentiate content would have been obvious. In regard to claim 9, Mackay discloses red color for the high-carbohydrate content foods, orange or amber color coding for the

moderate carbohydrate content foods, and green color coding for the low carbohydrate content foods (page 1 lines 13-19, 89, 107-115; page 2 claim 3).

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Vera Stulii/

Examiner, Art Unit 1794

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/Gregory L Mills/

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Steven Weinstein, Primary Examiner, Art Unit 1794

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